

*United States Court of Appeals
for the Second Circuit*

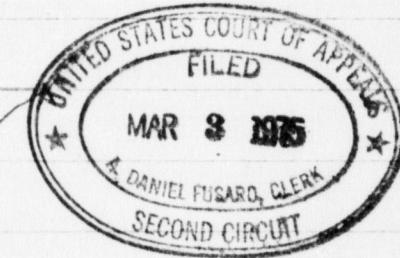


**APPELLANT'S
REPLY BRIEF**

UNITED STATES COURT OF APPEALS REC
3-3-75
SECOND CIRCUIT

ROBERT C. MERCKEINS
PLAINTIFF - APPELLANT

V



INDEX # 74-2663

F.I. DUPONT, GLORE FORGAN & Co
A/K/A DUPONT WALSTON INC.
DEFENDANT - APPELLEE

APPELLANT'S REPLY BRIEF

IN APPEAL FROM
JUDGE L.F. MACMAHON'S
MEMORANDUM JUDGEMENT IN CASE # 74CIV1585

ROBERT C. MERCKEINS
PRO SE
P.O. BOX 1173
NEW YORK 10023, N.Y.

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REPLY TO DEFENDANT'S ARGUMENT- POINT I

- 1) THE DEFENDANT CONTINUES TO IGNORE OR DENIES THE EXISTANCE OF CHARGES OF FRAUD STATED IN THE SUMMONS & COMPLAINT, ARTICLE I-2, 3+4,
- 2) PLAINTIFF AGAIN EMPHASIZES THE FACT THAT HE IS APPEARING AS A PRO SE, AND DIRECTS ATTENTION TO EXHIBIT A, THE PRO SE FORM ATTACHED TO PLAINTIFF'S MAIN BRIEF.
- 3) PLAINTIFF, AS A PRO SE, HAS STATED A CASE OF FRAUD IN THE COMPLAINT & IN THE ANSWER TO THE MOTION FOR SUMMARY JUDGEMENT.
- 4) THE COMPLAINT IN ARTICLE I-2 SPECIFICALLY STATES A CHARGE, "THE DEFENDANT VIOLATED PROVISIONS OF THE SECURITIES & EXCHANGE ACT OF 1934 [HEREAFTER "THE ACT"] BY GIVING ME FALSE INFORMATION IN ORDER TO SELL STOCK TO ME," PARTICULARS ARE GIVEN IN ARTICLE I-5.
- 5) IT IS ABSUAD FOR THE PLAINTIFF, A PRO SE, TO BE REQUIRED TO INFORM, THE THIRD LARGEST BROKERAGE HOUSE & THEIR ATTORNEYS THAT, AS A MATTER OF LAW, THIS IS A CHARGE OF FRAUD, OR THAT THE SPECIFIC SECTION OF "THE ACT" IS NUMBERED 10B.

6) ARTICLE I-4 OF THE COMPLAINT CHARGES, "THE DEFENDANT HAS COMMITTED FRAUD BY" -

7) THE DEFENDANT DENIED THESE CHARGES IN HIS ANSWER TO THE COMPLAINT AND MADE NO MOTION FOR A MORE DEFINATE STATEMENT. [UNDER FEDERAL RULE # 12 E]

8) ATTACHED TO THIS BRIEF AS EXHIBITS B, C, + D ARE LETTERS TO THE DEFENDANT + THE N.Y. STOCK EXCHANGE WHICH PROVE THAT DEFENDANT HAS BEEN AWARE OF CHARGES OF FALSE INFORMATION GIVEN IN ORDER TO SELL STOCK, TOGETHER WITH REGULATION MARGIN VIOLATIONS, SINCE MAY OF 1971,

9) PLAINTIFF CITES AGAIN BOWMAN V HARTIG [334 F. SUPP 1323 D.C. N.Y. 1971] THE COMPLAINT SHOULD NOT BE DISMISSED FOR INSUFFICIENCY WHEN THE DEFENDANT, AS PLAINTIFF'S BROKER, HAS ALL THE FACTS,

10) IN PEARLSTEIN V SCUODER + GERMAN [429 F.2d 1136 2ND CIRCUIT] THE FEDERAL SECURITIES LAWS CHARGE BROKERS WITH KNOWLEDGE OF MARGIN REQUIREMENTS + DUTY TO OBEY THEM. THE DEFENDANT MUST KNOW THAT MARGIN REQUIREMENTS CAN BE A PART OF A FRAUD ACTION, AS IN THIS CASE, "A CLAIM ARISING FROM ALLEGED VIOLATION OF REGULATION T IS NOT BARRED BY A STATE STATUTE OF LIMITATIONS FOR ACTIONS CREATED BY STATUTE, SINCE THE ALLEGED VIOLATIONS ARE PART OF A SINGLE WRONG - DOING & SOUNDING IN FRAUD,

MAKING THE LENGTHIER STATUTE OF LIMITATIONS FOR
ACTIONS BASED UPON FRAUD APPLICABLE" FROM
CONWAY V NEWBURGER, LOEB & CO AL (SD.N.Y. 71 CIV 1508)

1) ALSO AS IN HORN BLOWER & WEERS - HEMPHILL V BURCHFIELD 366 F.Supp 1368
IN OTHER CIRCUMSTANCES, CLAIMS OF MARGIN VIOLATIONS MAY
CONSTITUTE PART OF § 10(B) CLAIM UNDER "THE ACT", IN WHICH
CASE, THE SIX YEAR (FRAUD) LIMITATIONS PERIOD [§ 213(9)]
APPEARS TO APPLY".

A) THE STATUTES OF LIMITATIONS CITED BY DEFENDANT IN
SECTION 18C AND SECTION 29 OF "THE ACT" WOULD
NOT BE APPLICABLE IN THIS CASE OF FRAUD.

B) THE DEFENDANT'S MOTION FOR SUMMARY JUDGEMENT
IGNORED CHARGE OF FALSE STATEMENTS IN ORDER TO
SELL STOCK + CHARGE OF FRAUD MADE IN THE
COMPLAINT, ARTICLE I-2 & I-4,

14) FEDERAL RULE OF CIVIL PRACTICE 56 STATES "COURT MAY
ALLOW ANSWER BY DEPOSITION + ETC." THE COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK, IN RULE #96, DEMANDS
ONLY A SIMPLE STATEMENT OF THE FACTS TO CONTROVERST
DEFENDANT'S STATEMENT IN SUPPORT OF MOTION FOR
SUMMARY JUDGEMENT.

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15) PLAINTIFF'S STATEMENT PURSUANT TO RULE 9G COULD NOT CONTROVERT DEFENDANT'S ARGUMENTS AGAINST FRAUD, BECAUSE DEFENDANT MADE NO SUCH ARGUMENT.

16) THEREFORE, PLAINTIFF'S STATEMENT AGAIN STATED CHARGES OF FRAUD IN VIOLATION OF PROVISIONS OF "THE ACT" AS STATED IN THE COMPLAINT + CITED THE APPLICABLE STATUTE OF LIMITATIONS OF SIX YEARS,

17) THE PLAINTIFF, AS A PRO SE, HAS PROPERLY STATED A CASE WITH CHARGES OF ACTS OF FRAUD IN VIOLATION OF THE PROVISIONS OF "THE ACT" IN BOTH THE COMPLAINT AND THE ANSWER TO MOTION FOR SUMMARY JUDGEMENT.

18) THEREFORE, JUDGE L.F. MACMAHON'S DECISION OF NOV, 1974 WAS IN ERROR + SHOULD BE REVERSED BECAUSE THE APPLICABLE STATUTE OF LIMITATIONS IS CPLR 213(9) WHICH ALLOWS SIX YEARS TO START AN ACTION.

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REPLY TO DEFENDANT'S ARGUMENT - POINT II

SUMMARY JUDGEMENT SHOULD NOT BE GRANTED BASED ON THE LACK OF PERSONAL JURISDICTION OVER FIDGF.

- 1) DEFENDANT'S ARGUMENT ON THIS POINT RESTS ON TWO PARTS A) THE UNTRUE CLAIM THAT PLAINTIFF DID NOT PROPERLY OPPOSE THE MOTION FOR SUMMARY JUDGEMENT. B) AFFIDAVITS BASED ON A JUDGE BYRNE'S DECISION & THE FINDINGS OF AN ASSOCIATION OF SECURITIES DEALERS.
- 2) THE DEFENDANT CITES SEC V SPECTRUM, LTD [54FRD 70 S.D.N.Y. 1971] IN THIS CASE, THE JUDGE SPECIFICALLY STATED THAT NO "PAPERS" WERE FILED AND MORE SPECIFICALLY THAT NO STATEMENT PURSUANT TO RULE 96 WAS FILED IN OPPOSITION TO MOTION FOR SUMMARY JUDGEMENT.
- 3) DOES THE DEFENDANT NOW DENY OR IGNORE THE EXISTANCE OF PLAINTIFF'S ANSWER TO MOTION FOR SUMMARY JUDGEMENT WITH THE REQUIRED STATEMENT PURSUANT TO RULE 96 AND SUPPORTING EXHIBITS?
- 4) IN THE RECORD IS PLAINTIFF'S ANSWER TO MOTION FOR SUMMARY JUDGEMENT. IT CONTAINS A STATEMENT PURSUANT TO RULE 96 AND EXHIBITS WHICH CONTROVERT DEFENDANT'S MOTION.

5) THIS STATEMENT IS THE ONLY FORM REQUIRED BY THE SOUTHERN DISTRICT OF NEW YORK COURT AND PER THE PRO SE CLERK REQUIRES ONLY PLAINTIFF'S SIGNATURE.

6) THEREFORE, MOTION FOR SUMMARY JUDGEMENT WAS PROPERLY ANSWERED.

7) THE PLAINTIFF SUBMITS THAT PROPER SERVICE WAS MADE IN THIS CASE BECAUSE DUPONT, GLORE FORGAN INC, [HEREAFTER-DGF] IS IN FACT THE SUCCESSOR COMPANY TO F.I. DUPONT, GLORE FORGAN & CO. [HEREAFTER-FIDGF]; AND THAT DUPONT WALSTON INC, [HEREAFTER-WALSTON] IS THE SUCCESSOR COMPANY TO DGF,

8) FURTHER THAT DGF HAS ACTED AS BOTH SUCCESSOR COMPANY AND OR AGENT FOR BOTH F.I.D.G.F + WALSTON, AND THAT SERVICE ON AGENT IS SERVICE ON THE PRINCIPAL.

9) THE DEFENDANT CITES NICHOLAS BROCKMAN, ET AL V DUPONT GLORE FORGAN, INC ET AL NO 72-1916 AND ALSO EDWIN BALDWIN, ET AL V D.G.F. INC NO 71-1921. THESE CASES HAVE NO RELEVANCE IN THIS CASE BECAUSE THE STAATS CORP PURCHASE DID NOT MEET THE CONDITIONS THAT JUDGE BYRNE SETS FORTH IN HIS CONCLUSIONS ON PAGE #5 OF THAT TRANSCRIPT.

1) HOWEVER, JUDGE BYRNE IN HIS CONCLUSIONS (PG #5) SPECIFICALLY STATES THAT THE PURCHASER IS LIABLE WHEN A) THE ASSET ACQUISITION CONSTITUTED IN REALITY A MERGER OR CONSOLIDATION; OR C) THE PURCHASER IS A CONTINUATION OF THE SELLER,

2) BOTH OF THE ABOVE CONDITIONS ARE TRUE IN THIS CASE.

3) THEREFORE, BY JUDGE BYRNE'S DECISION, D.G.F. IS A LIABLE PARTY & A SUCCESSOR COMPANY TO F.I.D.G.F.

4) FURTHER, IN THE MATTER OF THE NATIONAL ASSOCIATION OF SECURITIES DEALER, INC. - COMPLAINT #ATL-452 THE ASSOCIATION CLEARLY FOUND THAT D.G.F. WAS A SUCCESSOR COMPANY TO F.I.D.G.F. IN FACT, THERE WAS NO SUCH QUESTION RAISED. THE ASSOCIATION MERELY STATED THAT NO REMEDIAL PURPOSE WOULD BE SERVED BY HOLDING D.G.F. RESPONSIBLE FOR F.I.D.G.F. ACTS, SINCE THE EMPLOYEE RESPONSIBLE FOR VIOLATIONS HAD BEEN DISCHARGED.

5) THEREFORE, NONE OF DEFENDANTS ARGUMENTS THAT D.G.F. IS NOT A SUCCESSOR COMPANY & THAT SERVICE IN THIS CASE IS IMPROPER, ARE VALID.

5) PLAINTIFF'S POSITIVE ARGUMENT AGAINST MOTION FOR SUMMARY JUDGEMENT WAS STATED IN THE STATEMENT PURSUANT TO RULE 96 IN THE ANSWER TO MOTION AND ARE AS FOLLOWS:

1) F.I.D.G.F., THE DEFENDANT, HAS BEEN PROPERLY SERVED WITH A SUMMONS AND COMPLAINT IN THIS ACTION, BECAUSE D.G.F. IS THE AGENT AND/OR THE SUCCESSOR COMPANY TO F.I.D.G.F. AND WALSTON INC.

2) IN ABOUT APRIL OF 1970, PLAINTIFF SIGNED A BROKERAGE AGREEMENT WITH THE FRANCIS I. DUPONT CO; IN JULY OF 1970, THE FIRM BECAME F.I.D.G.F. IN MAY OF 1971, THE FIRM CHANGED ITS NAME TO D.G.F. INC. FINALLY THE NAME WAS CHANGED TO DUPONT WALSTON INC.

3) THESE CHANGES CAME WITHOUT ANY NEW BROKERAGE AGREEMENT.

4) ALL PLAINTIFF'S STATEMENTS FROM THESE COMPANIES CARRY PLAINTIFF'S SAME ACCOUNT NUMBER, THE SAME OFFICE NUMBER AND HAVE THE SAME ACCOUNT EXECUTIVE, THESE COMPANIES ARE SUCCESSOR COMPANIES, COPIES OF EXAMPLE STATEMENTS ARE ATTACHED TO STATEMENT PURSUANT TO RULE 96 IN RECORD.

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2) D.G.F. ACTED AS SUCCESSOR COMPANY BY EXPLAINING ACTS OF F.I.D.G.F. IN THIS CASE TO THE SECURITIES & EXCHANGE COMMISSION IN THEIR LETTER OF JAN. 4, 1972, ALSO IN LETTERS WRITTEN TO MCKENZIE, CABELL, MARTIN & GREENE WITH REGARD TO THIS CASE, D.G.F. ASSUMED RESPONSIBILITY FOR THE VIOLATIONS COMMITTED BY F.I.D.G.F. COPIES ATTACHED TO RECORD.

2) WALSTON INC. SENT PLAINTIFF LETTER NAMING D.G.F. AS THEIR AGENT FOR INSTRUCTIONS & QUESTIONS IN THE FUTURE. COPY ATTACHED TO STATEMENT 96 IN RECORD.

2) IN DECEMBER 1971, D.G.F. EMPLOYEE, MR. D. CASADONA, STATED ORALLY TO PLAINTIFF THAT HE HAD COMPLETE AUTHORITY & RESPONSIBILITY IN THE MATTER OF THIS CASE.

2) THEREFORE, D.G.F. IS A SUCCESSOR COMPANY TO F.I.D.G.F. AND HAS ACTED AS A SUCCESSOR COMPANY OR AGENT FOR BOTH F.I.D.G.F. & WALSTON.

2) THEREFORE, PROPER SERVICE WAS MADE IN THIS CASE.

2) THE PLAINTIFF ASKS THE COURT TO NOTE THAT DURING THE DELAYS CAUSED BY THE DEFENDANT, THE DEFENDANT HAS CLOSED HIS OFFICES IN NEW YORK; THE TELEPHONE CO. HAS NO LISTINGS FOR F.I.D.G.F., WALSTON OR D.G.F.

2) THEREFORE, PLAINTIFF DEMANDS THAT COURT OF APPEALS REVERSE JUDGE L.F. MACMAHON'S MEMORANDUM DECISION OF NOV. 8, 1974, AND DISMISS DEFENDANT'S MOTION FOR SUMMARY JUDGEMENT BECAUSE;

A) THERE IS A TRIABLE ISSUE OF FACT IN THIS CASE, THAT OF ACTS OF FRAUD IN VIOLATION OF "THE ACT,"

B) THAT THE APPLICABLE STATUTE OF LIMITATIONS IN THIS CASE IS SECTION 213(9) CPLRC OF NEW YORK STATE WHICH ALLOWS SIX YEARS TO START AN ACTION.

C) THAT THE DEFENDANT WAS PROPERLY SERVED WITH A SUMMONS AND COMPLAINT.

2) PLAINTIFF REQUESTS COURT TO ORDER A PROMPT JURY TRIAL FOR THIS CASE.

DATED: NEW YORK, NEW YORK

MARCH 2, 1975

SUBMITTED BY

ROBERT C. MERCKENS

P.O. BOX 1173

NEW YORK 10023, NEW YORK

9910

39
c/o Union de Banques Suisses
1902 Lausanne

May 31 1971

Securities and Exchange Commission
Complaint Department
100 N. Capital St.
Washington D.C.

Re: Account 800-7693-21
F.I. DuPont, Duore Foreign & Co.
By letter May 15th 1971

Dear Sir,

In reference to my letter of May 15th 1971, where I informed you of the incident as follows:

"On November 6th 1970 I requested Mr. Peter Holloman of DuPont's Lausanne Switzerland office to wire New York to determine if there sufficient funds to short B.I., they answered affirmatively, and I made this transaction."

I have now determined with the aid of some other registered representatives that this information that DuPont Co. gave me was incorrect the time of the November 6th trade I violated by agreeing to several thousand dollars the margin requirements.

I request the SEC to make proper investigation and (1) force DuPont Co. to nullify the transaction of Nov. 6th 1970 or (2) liquidate the account at the Nov. 6th 1970 date and prices.

Please advise me of what action or recommendations you take in the above matter. If you have any questions please contact me at the above address.

Yours truly,

Exhibit B

ONLY COPY AVAILABLE



DIVISION OF
TRADING AND MARKETS

SECURITIES AND EXCHANGE COMMISSION

WASHINGTON, D.C. 20549

MAY 27 1971

Mr. Robert C. Merckens
c/o Union de Banques Suisses
1002 Lausanne
Switzerland

Re: F. I. Dupont, Clore Forgan & Co.

Dear Mr. Merckens:

Thank you for your recent communication concerning your problem with the above-mentioned broker-dealer.

We are sending your broker a copy of this letter, asking him to conduct an appropriate investigation and to give us a report of his findings, with a copy of that report to you. We will consider such report in light of our duty to enforce the federal securities laws.

We are using this form letter in an effort to assist you promptly and not for lack of interest on our part in your problem. Accordingly, if your problem is not resolved satisfactorily within a reasonable time, please write to us again.

Sincerely yours,

Gladys E. Greer, Chief
Section of Complaint Processing

NEW YORK STOCK EXCHANGE, INC.

DEPARTMENT OF MEMBER FIRMS

4 NEW YORK PLAZA
AT BROAD AND WATER STREETS
NEW YORK, N.Y. 10004

DIVISION OF
INQUIRIES AND COMPLAINTS

June 10, 1971

Mr. Robert C. Merckens
c/o Union de Banques Suisses
1002 Lausanne

Dear Mr. Merckens:

RE: dupont Glore Forgan Inc.

Thank you for your further letter dated May 31, 1971. Please be advised we have forwarded this letter to duPont Glore Forgan Inc. to be included in your file. As soon as we have received a reply from the firm, we will, of course, forward it to you for your comments.

Very truly yours,

Ruthie S. *Stiles*

Robert M. Santora
Complaints Investigator

C-2

11-7

6/4/80. 111. 18

F.I. duPONT, GLORE FORGAN & CO.
MEMBERS PRINCIPAL SECURITY AND COMMODITY EXCHANGES

ONE WALL STREET, NEW YORK, N.Y. 10005
TELEPHONE: (212) 344-2000

May 28, 1971

Mr. Robert C. Merckens
c/o Union de Banques Suisses
1002 Lausanne
Switzerland

Re: 809-5693

Dear Mr. Merckens,

We acknowledge receipt of your recent letter concerning the problem in your account.

The appropriate action that is deemed necessary will be taken in compliance with your request and you will be notified upon resolution of the matter.

Thank you for writing to us.

Very truly yours,

Herbert Goudry
Herbert Goudry
Customer Service

1
2
3
HG/em

cc: Bruce Stone, Mgr.
809 Office

Robert M. Santora, NYSE

D

COPY RECEIVED

March 3

1975

9:15 AM

WEIL, GOTTLIEB & MANGES

ATTORNEYS FOR Defendant - Appellee

Neal Selway, Jr.